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Supreme Court of the United States

OCTOBER TERM, 1932

No. 171

MRS. J. H. POBRESLO,

Plaintiff and Appellant,

vs.

JOSEPH M. BOYD COMPANY,

Defendant,

CLARENCE E. KARN, L. D. ATKINSON, LEO T. CROWLEY and EDWARD J. SAMP,

Garnishee Defendants and Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF RESPONDENTS

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF RESPONDENTS

NATURE OF THE CASE AND STATEMENT OF FACTS

This is an appeal by the plaintiff from a judgment of the Supreme Court of the State of Wisconsin dismissing this action as against the Garnishee Defendants. The action is one

at law based upon contract against the principal defendant the Joseph M. Boyd Company. More than four months prior to the commencement of the action this company had made an assignment for the benefit of creditors to three trustees who had invoked the jurisdiction of the Circuit Court for Dane County and were administering the property for the benefit of creditors at the time of the commencement of the action. These trustees and a successor trustee were named as garnishee defendants on the theory that the assignment was void and the trustees had in their possession money and property belonging to the debtor corporation.

In the administration of the trust by the trustees the jurisdiction of the trial court had been invoked pursuant to Chapter 128 of the Statutes of the State of Wisconsin which provided for the regulation and administration of voluntary assignments for the benefit of creditors. That Statute is set forth in full in an appendix to this brief.

The trustees in invoking the jurisdiction of the court failed to comply in terms with the Statute in that they took possession of the property of the company before furnishing a bond and at no time furnished a bond in a sum equal to the then assets of the company as required by the Statute, although a bond was filed in amounts fixed by and at times required by an order of the Circuit Court (R. 5).

The plaintiff asserted that this failure to comply with these statutory provisions voided the assignment under the provisions of Section 128.06 which provided in part as follows:

> "All voluntary assignments or transfers . . . for the benefit of or in trust for creditors shall be void as against the creditors of the person making the same unless the assignee shall be a resident of this state and shall before taking possession of the property assigned and before taking upon himself any trust conferred upon him by the instrument of assignment, deliver to the County Judge or Court Commissioner of the county in which such assignor or someone of the assignors at the

time of the execution of such assignment shall reside, not being a creditor of such assignor, a bond duly executed to the clerk of the Circuit Court of the county by his name of office as obligee in a sum not less than the present value of the assets of such assignor . . . ."

The garnishee defendants (hereinafter for the sake of brevity termed "the defendants") however, as a bar to this action relied upon a later provision in the same section:

> "No creditor shall in any case where a debtor has made or attempted to make an assignment for the benefit of creditors or in case of insolvency of any debtor, by attachment, garnishment or otherwise obtain priority over other creditors upon such assignment being for any reason adjudged void or in consequence of any sale, lien or security being adjudged void under the provisions of this act. And in all such cases the property of such insolvent debtor shall be administered for the ratable benefit of all creditors of such insolvent debtor under the direction of the court by the assignee or any receiver of said property and estate appointed as hereinafter provided."

The Supreme Court of the State of Wisconsin in sustaining the defendant's position held valid those portions of the Statute regulating voluntary assignments including the quoted portion of Section 128.06.

The case arose on plaintiff's affidavit in garnishment and the defendant's answer thereto, the plaintiff having moved for judgment on the pleadings. We mention this because the appellant has set forth in her brief various allegations made by her in her garnishee affidavit which are stated to have been admitted. Certain of these allegations (set forth on pages 4 and 5 of appellant's brief) are nothing more than legal conclusions as to the force and meaning of the Statute (Chapter 128) and are therefore not admitted under the Wisconsin practice. *State ex rel Johnson* v. *Nye,* 148 Wis. 659, 135 N. W. 126.

The further allegation that the assignment was made by the debtor corporation *while insolvent* is, we take it under the pleadings, denied. The garnishee affidavit following the form usual in Wisconsin recites that the action is founded upon express contract, recites the amount of the plaintiff's claim and recites that the garnishee defendants are jointly indebted to and have property real and personal in their possession and under their control belonging to the principal defendant. There then follow elaborate allegations with respect to the making of the assignment among which appears an allegation of the insolvency of the Joseph M. Boyd Company. The affidavit and answer in garnishment states that the garnishee defendants are in no manner and upon no account whatever indebted to the defendant Joseph M. Boyd Company unless an indebtedness exists under certain facts and circumstances which are then set forth in detail. These facts and circumstances relate to the making of the assignment in question. Nowhere is there any admission or statement with reference to either the solvency or insolvency of the Joseph M. Boyd Company. In view of these allegations and in view of the fact that the garnishee affidavit expressly denies any indebtedness except and only in the event that an indebtedness exists under the facts there set forth, we take it on any fair interpretation of the pleadings and in view of the fact that the case arose on a motion for judgment on the pleadings, that the allegation of insolvency on the part of the principal debtor stands denied. *Madregano* v. *Wisconsin Gas and Electric Co.*, 181 Wis. 611, 195 N. W. 861.

Subsequent to the commencement of this action an amended assignment was executed by the debtor corporation. In our view of the case the terms of this amendment are for the purposes of this argument immaterial. The amended assignment, however, may be found on pages 18 to 24 inclusive of the Record.

The assignment authorized the sale of assets upon credit and gave the assignees the authority to conduct and continue

the business and to postpone the sale and collection of the property for such time as was consistent with reducing the same to money until the same could be wisely done (R. 22). The assignment also limited the liability of the trustees to cases of loss resulting through their own wilfull default (R. 23). It was asserted by the plaintiff that these provisions voided the assignment as a common law assignment apart from the Statute.

Decision of the Supreme Court in this Action.

The Supreme Court of the State held the assignment was an attempt to make an assignment for the benefit of creditors (R. 51). The court did not hold as stated by counsel at page 18 of their brief that the assignment was not a common law assignment but expressly refused to pass on this question and on the validity of the assignment as an assignment at common law, holding such a determination unnecessary in their view of the case. The court held that those provisions of Chapter 128 relating to voluntary assignments are properly severable from the remaining portions of the chapter and that so severed, they are not in conflict with the Federal Bankruptcy Act (R. 51). The court stated:

> "We conclude, therefore, that the provisions of Chapter 128 relating to voluntary assignments for the benefit of creditors are properly severable from the remaining sections of said chapter; that so severed they are not in conflict with the Federal Bankruptcy Act; that an assignment for the benefit of creditors is an act of bankruptcy and all proceedings in the state court might be superseded by the Federal Bankruptcy Act when the jurisdiction of the Federal Court is properly and in a timely manner invoked" (R. 51).

The court also stated that Chapter 334 of the Laws of 1897 (containing the prohibition against garnishment hereinbe-

fore referred to) constitutes a valid enactment barring a recovery by the plaintiff in this case. The court continues:

> "That Chapter 334 of the Laws of 1897 constitutes a valid enactment and barred the plaintiff herein from bringing a garnishment action against the assignee even though the assignment would otherwise be void but for such saving clause" (R. 51).

Issues Raised by the Appeal

The issues in this court are simple. The action is one of garnishment and garnishment has been repeatedly held to be a statutory remedy. *Commercial Investment Trust Company* v. *William Frankfurth H. Company,* 179 Wis. 21, 190 N. W. 1004; *Lehner* v. *Rudinger,* 185 Wis. 464, 201 N. W. 748. The Statute is harsh and must be strictly adhered to. *Lehner* v. *Rudinger, supra; Bates* v. *Milwaukee & St. Paul R. Company,* 60 Wis. 296, 19 N. W. 72.

Here Section 128.06 Wisconsin Statutes expressly prohibits garnishment in the case of an assignment for the benefit of creditors for any reason being adjudged invalid. There is on the face of it nothing involving a federal question about this provision and the plaintiff's claim is reduced to the proposition that because this provision came into being as a part of Chapter 334 of the Laws of 1897 (hereinafter more particularly set forth) and is incorporated in Chapter 128, an enactment assuming to regulate voluntary assignments, it must fall.

With this statutory situation and in view of the decision of the Supreme Court of the State of Wisconsin with reference to the severability of the Chapter the most that can be required of the defendants is to sustain those portions of the chapter contained in Sections 128.01 and 128.06 inclusive, regulating voluntary assignments.

In the event, however, that for any reason the entire chapter should be condemned, then the defendant's position is still sound if the assignment is valid as a common law assignment apart from the Statute. This we take it is a non-federal question not properly for the consideration of this court.

We also take the position in this case that the court should not lend its aid to the plaintiff in these actions where the plaintiff is seeking to accomplish ends inconsistent with that equality among creditors which laws have always designed to secure. *Boese* v. *King,* 108 U. S. 379. This thought will hereinafter be more fully developed.

The issues in this court, then, are two-fold:

1. Are those portions of Chapter 128 dealing with the regulation and administration of voluntary assignments for the benefit of creditors and including the prohibition of garnishment contained in Section 128.06 valid, and

2. In any event should the court lend its aid to the plaintiff in this action?

ARGUMENT

I.

HISTORY OF THE LEGISLATION

The Court in this and other Cases Reviewed the History of the Legislation.

In determining that those portions of Chapter 128 regulating voluntary assignments were severable from other portions of the act, the state court gave careful consideration to the legislative history of the enactment. The matter had already been considered at some length in the case of *Voluntary Assignment of Tarnowski,* 191 Wis. 279, 210 N. W. 836.

Upon this legislative history, its decision seems to have largely turned. The court stated:

> "A careful consideration of all of the acts of the legislature which are now incorporated into Chapter 128 of the Statutes reflects the clear intention of the legislature to provide for two separate and distinct proceedings, one relating to assignments for the benefit of creditors and the other relating to the discharge of insolvent debtors. In view of the recent review by this court, of the several enactments leading up to Chapter 128 as it now exists, we content ourselves by referring to the opinion in the Tarnowski case. There exists in our minds no question as to the plain duty of this court to construe the several provisions of Chapter 128 relating to assignments for the benefit of creditors as separate and distinct from the other provisions of said chapter relating to the discharge of insolvent debtors."

Independent of Chapter 128 and antedating it, Wisconsin has at all times had a true Insolvency Law.

The legislative history as outlined by counsel at pages 6 to 12 inclusive of their brief is correct as far as it goes, but it leaves entirely out of consideration the fact that since as early as 1848 Wisconsin has had not only a statute providing for the regulation and administration of voluntary assignments, but also a statute in terms denominated an insolvency act and dealing with the administration of the estates of insolvents. This statute dealing with proceedings in insolvency and providing for the administration of estates of insolvents and the discharge of insolvent debtors is clearly in conflict with the Bankruptcy Act and has been superseded by that act. It is significant, however, that this statute has paralleled the statute here under consideration dealing with the regulation and administration of voluntary assignments for the benefit of creditors, and even now appears in the Statutes of the state as Chapter 335.

The presence of that insolvency law takes all meaning from the argument made by plaintiff's counsel at page 20 of their brief for they there assert that those enactments dealing with voluntary assignments, being complete prior to 1898, the date of the present Bankruptcy Act, evidence an intention on the part of the legislature to treat them as bankruptcy laws and a substitute for the Federal Act. The conclusion is just the other way when it is realized that side by side with these measures regulating voluntary assignments, the state had during this whole period a complete insolvency law which had force and purpose and took the place of the Bankruptcy Act. Undoubtedly this fact was persuasive in leading the court to hold as it did that the original statutes dealing with voluntary assignments did not relate to "the subject of bankruptcies".

Chapter 128 is the outgrowth of Chapter 80 of the Laws of 1878; that Chapter with amendments through 1885 comprised a comprehensive scheme for the regulation of Voluntary Assignments.

In 1878, Chapter 80 was introduced into the Statutes. This chapter dealt with the regulation of voluntary assignments. In the Statutes of that year it appears headed "Of Voluntary Assignments" and what is now Chapter 335 and has just been referred to as an insolvency law appeared as Chapter 179 headed "Of Proceedings in Insolvency". Chapter 80 comprises ten sections containing the meat of what are now Sections 128.01, 128.06 (without the present saving clause) and Sections 128.11 to 128.18 inclusive. In 1882 by Chapter 170 of the laws of that year, Chapter 80 was amended so as to add a new section containing the substance of what is now Section 128.04. In 1883 two new sections were added to the chapter. These sections contained what is now the substance of the last sentence of Section 128.02 and the whole of Sec-

tion 128.03. In 1885 an additional section was added to the statute containing substantially what is now Section 128.05, and by a separate enactment in the same year the substance of the last portion of what is now Section 128.16 dealing with priorities was also added.

Now at this time then, namely the close of the year 1885 we had a comprehensive scheme contained in the statute law of the state providing for the administration and regulation of voluntary assignments for the benefit of creditors under the supervision and direction of the circuit courts. The statute as it then existed provided that the Circuit Judge should have supervision of proceedings in voluntary assignments (now Section 128.01); it invalidated preferences (now Section 128.02); it prescribed the powers of the assignee and authorized him to proceed to set aside preferences (now Section 128.03); it provided that the assignee in such a proceeding should stand in the shoes of the creditors and it provided the conditions upder which a creditor might bring an action to set aside a fraudulent conveyance (now Sections 128.04 to 128.05); it provided that voluntary assignments should be void as to creditors unless the assignee should give a designated bond (now Section 128.06); it indicated the manner in which the assignee might assent to the assignment (now Section 128.12); it required the assignor to make an inventory and to give notice to creditors, for hearings upon claims and the order of priorities and distribution to creditors (now Sections 128.13 to 128.16 inclusive); and it provided for the manner in which the assignee should settle his accounts and authorized the judge to remove an assignee upon the application of a majority of the creditors and for the appointment of a new assignee (now Sections 128.17 and 128.18).

This statute neither compelled nor authorized assignments but only prescribed a mode by which the trust created should be enforced. It provided for the security of the creditors by requiring a bond from the trustees for the discharge of their

duties. It required them to file statements showing what property had come into their possession and what they had done with the property and afforded various ways and means of compelling them to carry out the purpose of the conveyance. What was said of the statute of the State of Ohio regulating voluntary assignments, in the case of *Mayer* v. *Hellman*, 91 U. S. 496, might equally be said of this statute as it stood in 1885.

> "There is nothing in the act resembling an insolvent law, it does not discharge the insolvent from arrest or imprisonment; it leaves his after acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory provision."

The case of Winner v. Hoyt, 66 Wis. 227, 28 N. W. 380; Reasons for the addition of the saving clause in 1897.

This being the statutory situation, the court was concerned in the case of *Winner* v. *Hoyt*, 66 Wis. 227, 28 N. W. 380, decided in 1886, with a case where an assignment for the benefit of creditors had been made in good faith but the provisions of Chapter 80 with reference to the filing of a bond had not been complied with. Because of the clear and unequivocal provisions of the statute, making void an assignment executed in the manner in which that assignment was executed, the court sustained an intervening garnishment similar to that in the case at bar.

Eleven years later, the legislature further amended the chapter with the express purpose of correcting the inequitable result in the case of *Winner* v. *Hoyt*, and of assuring to creditors an equitable and pro rata distribution of assets so that one creditor might not as in the case of *Winner* v. *Hoyt*

secure a preference over others. This amendment, together with another amendment of an existing section, contained in Chapter 334 of the Laws of 1897, involved an amendment of what is now Section 128.06 so as to add thereto the saving clause hereinbefore set forth and relied upon by the respondents in this case. The Supreme Court of Wisconsin has used this language in speaking of that Chapter:

> "We can entertain no doubt that this legislation was aimed directly at the rule laid down in *Winner* v. *Hoyt*, *supra*, and following cases, that property attempted to be conveyed by a void voluntary assignment could be seized by any individual creditor by attachment or garnishment. Indeed these words are too plain to invite or permit an attempt to construe it upon that subject. We can but enforce it." *Gilbert Paper Company* v. *Whiting Paper Company*, 123 Wis. 472, 102 N. W. 20. See also *Plewa* v. *St. Josaphats Congregation*, 153 Wis. 276, 141 N. W. 267; *Mayfield Woolen Mills* v. *Goodrich and Martineau Company*, 189 Wis. 406, 207 N. W. 554.

Chapter 334 of the Laws of 1897 also created machinery by which creditors might initiate proceedings.

This chapter likewise added four new sub-sections to the statute, the substance of these new sections being now contained in Sections 128.07 to 128.10 inclusive. The new sections added create machinery by which creditors may initiate proceedings against an insolvent debtor who has given any creditor a preference, in which proceedings the court shall appoint a receiver and distribute the debtor's property pro rata among his creditors. These new sections added by the chapter introduce an element into what was then Chapter 80, somewhat foreign to its original purpose and bearing no relation to a statute regulating voluntary assignments.

Meanwhile in 1889 the Legislature added a Chapter dealing with the discharge of assignors.

Now in the interim in 1889 and by Chapter 385 of the laws of that year, there was written into the statutes a provision for the discharge of a debtor who had made a voluntary assignment for the benefit of creditors. That Chapter added to the statutes several new sub-sections containing the substance of what are now sections 128.19 to 128.29 inclusive. In that year when the statutes were printed, the amendments of 1889 were embodied in the statutes as Chapter 80A a separate enactment from Chapter 80 which contained all of the laws regulating voluntary assignments. In the statutes of that year, Chapter 80 was entitled: "Of Voluntary Assignments" and Chapter 80 A was entitled "Of the Discharge of Assignors". In 1898, subsequent to the amendment of 1897 containing the saving clause which we rely upon, for the first time do we find these two separate enactments grouped together in the statutes. There the entire chapter denominated Chapter 80 is entitled "Of Voluntary Assignments". We find, however, that even there those sections added by the Laws of 1889 although included in the chapter, bear a separate heading entitled "Discharge of Assignors".

The Amendments of 1897 were Germane only to the Original Act and did not Relate Either to Chapter 80A or other Portions of Chapter 334, Laws of 1897.

Now it is to be borne in mind that the amendment of 1897 containing the all important saving clause enacted to meet the situation presented in the case of *Winner* v. *Hoyt, supra,* was an amendment of Chapter 80 and not of Chapter 80 A and became a law at a time when the discharge features enacted in 1889 were incorporated in a separate chapter of the statutes. And the subject matter of the 1897 *amendment*

dealt solely with the administration of voluntary assignments and not the discharge of insolvents; was germane to Chapter 80 and not to Chapter 80 A.

The amendment of 1897 as we have pointed out consisted in the making of two changes in the existing law and the addition of four new sections. What is now Section 128.02 was amended so as to provide among other things that liens obtained in contemplation of insolvency or the making of an assignment within a limited period prior thereto should be void under certain circumstances, and what is now Section 128.06 was amended by the insertion of the saving clause here attacked. This clause ameliorated against the harsh rule of the section as it existed at that time and as we have pointed out was especially inserted to prevent the inequitable result reached in *Winner* v. *Hoyt, supra.* Both *amendments* were proper provisions with respect to voluntary assignments and related only to voluntary assignments. Both amendments dealt only with the administration of property transferred by an attempted assignment for the benefit of creditors. The new sections added by the same chapter creating as they do machinery for the winding up of the estate of an insolvent, similar to the machinery provided for the winding up of the property of a corporation in sequestration proceedings by Chapter 286 of the Wisconsin Statutes, was foreign to the original enactment. The context of the 1897 amendment to Section 128.06 obviously related to the matters covered by the earlier enactment and fell logically into the scheme of that enactment and bore no relation either to the discharge feature introduced in 1889 or the involuntary features introduced in other portions of the 1897 enactment.

With this legislative history before it, the highest court of the state very properly concluded that the present Chapter 128 is made up of two legislative acts, one dealing with the regulation and administration of voluntary assignments for the benefit of creditors and the other containing the elements

of an insolvency law, and that the field covered by the original enactment includes what is now Section 128.06 *with the saving clause* here attacked.

Contentions in the State Supreme Court with Respect to the Severability of the Saving Clause from other Portions of Chapter 334, Laws of 1897.

Counsel contended before the Supreme Court of the state as they do here that that portion of the 1897 amendment containing what is now Sections 128.07 to 128.10 inclusive and providing as it does for an equitable distribution of a debtor's property under certain circumstances despite the fact that no voluntary assignment has been made is an insolvency law and that therefore other portions of the amendment including the *saving clause* are invalid. We urged upon the court the view that a consideration of those sections was unnecessary in view of the fact that the amendment of the then existing Section 1694 (now Section 128.06) by the addition of the saving clause was an entirely independent matter germane only to a law dealing with the administration of voluntary assignments, not inter-related to or inter-dependent with the new sections added and in itself perfectly proper. We called the court's attention to the established principal of statutory construction that although some of the provisions of a statute may be unconstitutional or invalid, yet if the provisions that are proper are capable of being executed independently of those which are invalid, then the valid part may become operative unless it appears that the legislature intended that they should all be carried into effect as a whole and as conditions and compensations for each other. *Lynch* v. *Steamer "Economy"*, 27 Wis. 69. Stated in another way, that an entire statute is not void merely because some parts thereof are void, unless the void parts cannot be separated from the valid ones or were enacted as a compensation for the invalid ones

or unless the valid parts would not have been enacted except in conjunction with the void ones. *Brittingham Hixon Lumber Company* v. *Sparta*, 157 Wis. 345, 147 N. W. 635. We further called the court's attention to a long list of cases in which parts of a single enactment had been held separable and proper despite the invalidity of other parts of the same enactment.

II.

THE STATE COURT'S CONSTRUCTION OF THE CHAPTER WITH RESPECT TO THE QUESTION OF THE SEVERABILITY OF THE SAVING CLAUSE MAKES UNNECESSARY A CONSIDERATION OF THE VALIDITY OF CHAPTER 334, LAWS OF 1897, IN ITS ENTIRETY; THAT CONSTRUCTION IS BINDING UPON THIS COURT.

With this legislative history before it, the court clearly determined that the statute was severable. No further contention can be made with respect to the discharge features appearing in the statute for these have been lopped off by the state court. Now with respect to those portions of Chapter 334 of the Laws of 1897 bringing into the statute a new scheme for the initiation of proceedings by creditors, the court's decision is not as plain as it might have been. The court said:

> "That Chapter 334 of the Laws of 1897 constitutes a valid enactment and barred the plaintiff herein from bringing a garnishment action against the assignees, even though the assignment would otherwise be void but for such saving clause." (R. 51).

But also the court said:

> "We conclude therefore that the provisions of Chapter 128 *relating to voluntary assignments for the benefit of creditors* are properly severable from the remaining sections of said chapter." (R. 51).

When it is considered however that the court was not dealing with any portion of the 1897 Act except the saving clause, that section alone being drawn into question, and in view of the court's clear pronouncement as to severability, we submit that the court's reference to Chapter 334 was a reference to the saving clause and nothing else. We submit that the decision read as a whole draws the line between those portions of the act *relating to voluntary assignments for the benefit of creditors* and all other portions of the act. We submit that the court intended to and did declare the saving clause to be a portion of the statute relating to voluntary assignments and severable from all other portions of the statute including the additions made by Chapter 334, Laws of 1897.

We take this position at this time because we believe it to be the only fair interpretation of the state court's decision and because this brief is addressed to a consideration of the statute as we believe the state court has construed it. At pages 50 and 51 of counsel's brief, the validity of Chapter 334 of the Laws of 1897 is discussed and counsel reach the conclusion that that chapter constitutes an insolvency law. In view of the holding of the state court however this discussion and similar arguments made elsewhere in the plaintiff's brief are beside the point.

Even if the court should deem our interpretation of the state court's decision erroneous, however, the argument we have attempted to develop in this brief establishes that the statute is invalid. In fine, it is our position that the state court has determined the severability of the saving clause not only from all discharge features of the statute but also from

the *additions* made, as distinct from the *amendments* contained in Chapter 334, Laws of 1897; that this court considers only the statute as construed by the state court; but that in any event and even if the statute be construed to include *all* of Chapter 334, Laws of 1897, it is nevertheless valid.

The Construction of the statute by the state court is final; this court examines the statute as construed by the state court.

While the decision of the state court as to the validity of the statute is not binding upon this court and the court will look beyond the name and label that the state court affixes to the statute, it is equally well settled that the task of determining the intention of the state legislature as to the severability of various doubtful portions of the enactment rests primarily upon the state court and its decision is conclusive upon this court. *Dorchy* v. *Kansas*, 264 U. S. 286; *Clyde* v. *Gilchrist*, 262 U. S. 94. This is merely an application of the familiar principle that while the characterization of a statute by the state court as distinct from its construction is not binding upon this court, the construction of the statute by the state court is binding; the Supreme Court will only examine into the operation of the statute *as construed* by the state court. *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Truax* v. *Corrigan*, 257 U. S. 312; *Quong Ham Wah Company* v. *Industrial Accident Commission*, 255 U. S. 445; *Corn Products Refining Company* v. *Eddy*, 249 U. S. 427.

III.

RESPONDENT'S POSITION WITH RESPECT TO THE GENERAL PRINCIPLES APPLICABLE IN CONSIDERING THE VALIDITY OF THE CHAPTER.

The State Supreme Court Clearly Recognized the Supremacy of Congress in the Field of Bankruptcies.

The settled principle that Congress has preempted the field of bankruptcies and state insolvency laws are thus superseded was clearly recognized by the court in the case at bar. The court stated:

> "No doubt can longer exist that all state insolvency laws which provide for the discharge of insolvent debtors are suspended during the existence of the Federal Bankruptcy Act. If a state law is an insolvency law, the authorities are all to the effect that such law is suspended and wholly superseded by the Federal Bankruptcy Act." (R. 43).

And again:

> "We have no thought or intention of questioning the right of Congress to occupy exclusively the bankruptcy field but we fail to find any provision of the Bankruptcy Act or any decision of the United States Supreme Court construing it, which forbid voluntary assignments for the benefit of creditors, when not superseded by bankruptcy proceedings." (R. 49).

Article I, Section 8 of the Constitution contains a grant of power to Congress "to establish uniform laws on the subject of bankruptcies." We do not for a moment dispute the familiar principle that Congress having carried into effect the grant by the enactment of a bankruptcy law, has indi-

cated an exclusive purpose to preempt the field and that the field is no longer open for state legislation and state laws that are "bankruptcy laws" or as the courts have more frequently said "insolvency laws" are suspended. We meet counsel squarely upon the narrow issue: Do those portions of Chapter 128, Wisconsin Statutes, relating only to voluntary assignments for the benefit of creditors and including section 128.06 (bearing in mind that the highest court of the state has judicially found the independence of such portions of the chapter from the balance) constitute an insolvency law?

The Statement that the Ratable Distribution of a Debtor's Estate among his Creditors is the Essential Feature of a Bankruptcy Act is Questionable.

Counsel have collected numerous cases in their brief and have included numerous quotations directed to the proposition that the essential element of a bankruptcy law is the distribution of an insolvent's estate among his creditors and not the discharge of a debtor from his debts. They draw from this the conclusion that because the assignment features of Chapter 128 contain provisions for the distribution of the estate of the assignor among his creditors, that chapter is an insolvency law and is, therefore, void. We will not quarrel with counsel upon the basic premise although it is at least seriously questionable for the following reasons:

1. It is quite true that the earliest forms of bankruptcy laws as for example the Roman law did not include provisions for discharge of the debtor but solely provisions for the distribution of his estate, but at the time of the adoption of the constitution the bankruptcy laws of England from whom we took our system of jurisprudence contained and had for many years contained provisions for the discharge of debtors. See Queen Anne's Act of 1705; *Blackstone's Com-*

mentaries, Book II, Chapter XXXI. And all bankruptcy legislation enacted by Congress pursuant to the constitutional grant has contained as an essential feature provisions for the discharge of the debtor.

2. It is also true as stated by counsel that many text writers have adverted to the matter of distribution as being the essential feature of bankruptcy laws. But it is equally true that courts and among them this court have repeatedly declared the discharge of the debtor to be one of the essential features of a bankruptcy law. *Stellwagen* v. *Clum,* 245 U. S. 605; *In Re: Watts,* 190 U. S. 1; *Voluntary Assignment of Tarnowski,* 191 Wis. 279; *Star* v. *Johnson,* (Tex.) 44 S. W. (2nd) 429.

In any Event several Elements go to make up a Bankruptcy Law; Bankruptcy Laws are Characterized by Provisions for the Ratable Distribution of the Debtor's Estate, by Provisions for the Discharge of the Debtor, by the Fact that they Relate Primarily to Insolvent Debtors, and by the Existence of Provisions for Involuntary Action against the Debtor.

We will not quarrel with counsel as to the validity of the premise but we do most vigorously dispute the conclusion that counsel reach based upon this premise. The truth is that several elements go to make up a bankruptcy law as England understood the term in 1705 and as we understand it today. As counsel state the distribution of the debtor's estate ratably among his creditors is one of the essential elements of a bankruptcy law—perhaps the most essential element. But the granting of a discharge to the debtor is as we have pointed out, also an essential element of bankruptcy laws. And equally essential is the fact that bankruptcy laws relate to *insolvent* debtors and the distribution of their estates and are not primarily concerned with the distribution

of the estates of solvent debtors. *Remington on Bankruptcy*, Section 2110; *Pope* v. *Title Guaranty & Surety Company*, 152 Wis. 611, 140 N. W. 348; *International Shoe Company* v. *Pinkus*, 278 U. S. 261; *In Re: Weedman Stave Company*, 199 Fed. 948. In the last case cited, the court said:

> "The elements of an insolvency law are *insolvency*, surrender of property, its administration by a receiver or trustee, distribution of the assets among the creditors and a provision for priorities or other matters not permissible in the absence of such a statute." Page 950.

In the case of *International Shoe Company* v. *Pinkus*, this court stated:

> "The distribution of property of *insolvents* for the payment of their debts and providing for their discharge or that otherwise relate to the subject of bankruptcies are within the field entered by congress when it passed the Bankruptcy Act and, therefore, such provisions must be held to have been superseded." Page 266.

Equally essential to the idea of a bankruptcy law is the element of *compulsion*. If the essential element is as counsel says the ratable distribution of a debtor's property among his creditors it would seem to follow as a corollary that such a ratable distribution may be *forced* by the creditors. As Remington expresses it:

> "In order for a system to amount to a bankruptcy system, it must provide machinery *for throwing a debtor into insolvency involuntarily* and for completely administering his assets, and that if the system does so operate, then it is a bankruptcy system." *Remington on Bankruptcy*, Section 2110.

How many of these characteristics must be present before an enactment will be held to constitute an invasion of the field of bankruptcies, has never been expressly stated. We can

conceive perhaps of an enactment constituting a "bankruptcy act" although no provision for discharge is present. But equally the mere fact that the single element of the ratable distribution of a debtor's property among his creditors is present does not condemn legislation as within the prohibition. This has been well stated by the court in the very recent case of *Straton* v. *New*, 283 U. S. 318, a case strongly relied upon by the appellant. The court there said at page 327:

> "It was pointed out in *Stellwagen* v. *Clum, supra*, that state laws which provide for sale and distribution of a debtor's property may not amount to insolvency laws; and it was there held that such laws, if not inconsistent with the administration of the Bankruptcy Act, are available to litigants. Appellees must, therefore, show that the statutory action in the state court is in fact an insolvency proceeding. The certificate states no facts which lead to such a conclusion, nor does it so denominate the creditor's suit. Reference to the statutes of West Virginia of which we take judicial notice, demonstrates that it is not in that category."

To the same effect, see *Stellwagen* v. *Clum*, 245 U. S. 605; *Mayer* v. *Hellman*, 91 U. S. 496; *Star* v. *Johnson* (Tex.), 44 S. W. (2nd) 429; and *Hammond* v. *Lyons Realty Company*, 59 Fed. (2nd) 592 (C. C. A. 4th Cir.).

The Constitutional Grant must be Reasonably Interpreted; Ancient and Well Recognized Proceedings of the Character here Involved ought not to be Stricken Down and Weight Should be Given to the Practical Construction of the Wisconsin Act by the Good Faith Use of it in Reliance Upon the Many Wisconsin Decisions.

In every case in which the question arises it would seem to us that the legislation in question must be carefully examined bearing in mind all these various significant elements that go to make up what we know as a bankruptcy law. Up-

on the presence or absence of these various elements giving due weight to the interpretation of the enactment by the courts of the state involved, the decision must turn. The interpretation of the constitutional grant and its application must be reasonable however and must have some regard to business and economic exigencies. As this court states in the case of *International Shoe Company* v. *Pinkus, supra,* the national purpose to establish uniformity must be borne in mind. States ought not to be permitted to pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations. But on the other hand, ancient, expeditious and well recognized proceedings such as voluntary assignments for the benefit of creditors, which have proved of great value to insolvent debtors, debtors not actually insolvent but in financial stress, and to creditors, should not be struck down. See the opinion of the Supreme Court of Wisconsin in this case (R. 49).

So broad a construction should not be given to the language of the constitutional grant as to wipe out numerous legislative enactments having as their object the protection of debtors and creditors, merely because of the presence of the single element "ratable distribution to creditors."

In Wisconsin as in many other states, provisions have been made for the distribution of corporate estates in sequestration proceedings, irrespective of the solvency or insolvency of the debtor, *Chapter 286, Wisconsin Statutes;* for the administration of specific property of a debtor in proceedings supplementary to execution, *Chapter 273, Wisconsin Statutes;* and for the marshalling of assets within the broad equitable powers of the court, as well as for the regulation of voluntary assignments for the benefit of creditors. We submit that remedial legislation of this character should not be condemned unless it can be said that, having in mind the various elements of bankruptcy laws hereinbefore set forth, the legislation contains so many features common to bankruptcy laws

as to constitute in a real sense bankruptcy legislation. In this connection, it should be borne in mind that, in Wisconsin at least, numerous assignments for the benefit of creditors have been made and are now being administered, numerous sequestration actions are pending, and numerous proceedings of this general character have been initiated in perfectly good faith and in the belief that they are proper. This belief has doubtless been engendered by the following current of authority: *In Re: Voluntary Assignment of Tarnowski,* 191 Wis. 279, 210 N. W. 836; *Binder* v. *McDonald,* 106 Wis. 332, 82 N. W. 156; *Garden City Bank and Trust Company* v. *Geilfus,* 86 Wis. 612, 57 N. W. 349; *Segnitz* v. *Garden City Company,* 107 Wis. 171, 83 N. W. 327; *Duryea* v. *Muse,* 117 Wis. 399, 94 N. W. 365; *Hazelwood* v. *Olinger Building Department Stores,* 205 Wis. 85, 236 N. W. 349. Here is a practical construction that should not be overlooked.

Wisconsin Decisions Prior to This Case.

This case does not represent a new departure for the State of Wisconsin. It involves perhaps phases of the question not passed upon heretofore but the least that can be said is that it is the logical culmination of a uniform current of authority. Voluntary assignments have long been recognized in Wisconsin and the Wisconsin Supreme Court has on several occasions pointed out that Chapter 128 as well as other chapters upon the subject are merely regulatory. *Mayfield Woolen Mills* v. *Goodrich and Martineau Company,* 189 Wis. 406, 207 N. W. 554. That court has also stated that unless prohibited by statute, the right to make a voluntary assignment is inherent in a corporation and exists independently of Chapter 128. *Binder* v. *McDonald, supra.* See also *Klauber* v. *Charlton,* 47 Wis. 564, 3 N. W. 443; *Wadleigh* v. *Merkle,* 57 Wis. 517, 15 N. W. 838. In *Holton* v. *Burton,* 78 Wis. 321, 47 N. W. 624, the court having occasion to consider the provi-

sions of the statute with reference to voluntary assignments subsequent to the amendments of 1889 characterized the law as an insolvent law. Shortly thereafter, however, this characterization was criticized and as early as the case of *Binder* v. *McDonald, supra,* the court recognized the separability of what was then Chapter 80 A dealing with the discharge of assignors from the original enactment embodied in Chapter 80.

The court again adverted to the separability of these portions of the enactment in the case of *Segnitz* v. *Garden City Company,* 107 Wis. 171, and approved that portion of Chapter 128 containing measures regulating voluntary assignments, including section 128.06 with its saving clause while at the same time condemning that portion of Chapter 128 containing discharge features, as an invasion of the field of bankruptcy.

The interpretation placed upon the statute in the Segnitz case was reenunciated in the case of *In Re: Voluntary Assignment of Tarnowski,* 191 Wis. 279, where the court used this significant language:

> "The discharge of the bankrupt from his debts constitutes the very essence of the bankruptcy law. While the administration of the estate of the bankrupt and the distribution of the proceeds thereof pro rata among his creditors is a usual, if not a necessary incident of a bankruptcy law, the discharge of the debtor from his debts is no part of an assignment law. The winding up and a fair and equal distribution of the estate of insolvent debtors may arise in various ways, but where such a proceeding does not result in the discharge of the insolvent debtor, statutes regulating such a proceeding do not conflict in any manner with the bankruptcy law, and it has been squarely held by the Supreme Court of the United States that such laws are not superseded by the National Bankruptcy Act." (Page 285).

This court has apparently approved the interpretation placed upon the Wisconsin Statute by the Wisconsin Supreme Court.

It is of significance that the interpretation given Chapter 128 by the Wisconsin court in the case of *Segnitz* v. *Garden City Company, supra,* has apparently met with the approval of this court for that case was cited by this court in the recent case of *International Shoe Company* v. *Pinkus, supra,* with approval. While in the *Segnitz* case, the court did not deal squarely with the issue here presented, the court was there confronted with an interpretation of the statute and it did hold valid that portion of Chapter 128 containing measures regulating voluntary assignments *including section 128.06 with its saving clause,* while at the same time condemning that portion of Chapter 128 containing discharge features, as an invasion of the field of bankruptcy.

Federal cases considered; these cases indicate a line of cleavage between cases arising under general insolvent statutes as in International Shoe Company v. Pinkus, 278 U. S. 261, and cases arising under statutes regulating general assignments for the benefit of creditors as in Mayer v. Hellman, 91 U. S. 496.

The line between bankruptcy laws and legislation regulating voluntary assignments has been just as sharply drawn by this court and inferior federal courts. *Mayer* v. *Hellman,* 91 U. S. 496; *Boese* v. *King,* 108 U. S. 379; *In Re: Watts,* 190 U. S. 1; *Randolph* v. *Scruggs,* 190 U. S. 533; *Stellwagen* v. *Clum,* 245 U. S. 605; *International Shoe Company* v. *Pinkus,* 278 U. S. 261; *Straton* v. *New,* 283 U. S. 318; *In Re: Sievers,* 91 Fed. 366. See also *Old Town Bank of Baltimore* v. *Maryland,* 96 Md. 341, 53 Atl. 934; *Pelton* v. *Sheridan,* 74 Ore. 176, 144 Pac. 410; *Star* v. *Johnson,* (Tex.), 44 S. W. (2nd) 429, affirmed 47 S. W. (2nd) 608.

These cases represent an unbroken current of authority and the principle which distinguishes between cases arising under general insolvent statutes and cases arising under statutes regulating assignments for the benefit of creditors remains firmly entrenched in the reports of this court. In the last case cited, *Star* v. *Johnson,* the court aptly declared:

> "It is very evident that there are two distinct lines of decisions—one involving cases arising under general insolvent statutes, as in the *Pinkus* case, and the other involving cases arising under statutes permitting general assignments for the benefit of creditors, as in *Mayer* v. *Hellman, Boese* v. *King, Randolph* v. *Scruggs,* and *Stellwagen* v. *Clum, supra.* These cases are easily distinguished as was shown *In Re: Sievers,* (D. C.) 91 F. 366, 168, in the following language: 'Concerning these different contentions, it appears to me that there is a substantial difference between a proceeding under a general insolvency statute and one under a statute permitting general assignments. The one administers upon the estate of an insolvent as a proceeding in the courts, derives its potency from the law, winds up the estate judicially, and discharges the debtor. Such is essentially a proceeding in bankruptcy, and such is undoubtedly superseded by the Act of Congress in question * * *. The other derives its potency not from the law but from the contract or deed of the debtor, is administered under and according to the provisions of the deed, supplemented only by salutary legislative safeguards, and does not result in a discharge of the debtor from his obligations. This method of proceeding is not superseded by the Act of Congress in question.'" Pafe 431.

Voluntary assignments have long been recognized by this court as well as our state courts as time honored and expeditious proceedings. In the case of *Randolph* v. *Scruggs,* 190 U. S. 533, the court declared:

> "The assignment was not illegal. It was permitted by the law of the state, and cannot be taken to have been prohibited by the bankruptcy law absolutely in every

event, whether proceedings were instituted or not. *In Re: Sievers,* 91 Fed. Rep. 366; *In Re: Romanow,* 92 Fed. Rep. 510. It had no general fraudulent intent. It was voidable only in case bankruptcy proceedings should be begun. At the time when it was made the institution of such proceedings was uncertain." Page 537.

The mere fact that Congress recognized the validity of voluntary assignments by providing that voluntary assignments by the debtor constitute an act of bankruptcy, should alone be sufficient to show that Congress at least did not consider assignments made by debtors to in any way constitute an invasion of the field of bankruptcy. *A fortiori* statutes merely regulating voluntary assignments would not constitute invasions of the field of bankruptcy and as a matter of logic should be proper. Counsel have cited two cases at pages 39 and 40 of their brief, not passing upon this point but containing language condemning voluntary assignments. In view of the attitude of this court upon the subject as shown in the case of *Randolph* v. *Scruggs* just referred to, it would seem that the matter is now a closed issue.

The logic behind this argument must certainly be sound because in every case where this court has considered this question, statutes regulating voluntary assignments for the benefit of creditors have been sustained. We submit that the case of *Mayer* v. *Hellman, supra,* is decisive of the issues here presented. In that case the question before the court involved the validity of an assignment for the benefit of creditors made in the State of Ohio under a statute regulating the mode of making such assignments. The court held that neither the statute nor the voluntary assignment was superseded or in any way invalidated by the Bankruptcy Act. The language of the court is so apt in its application to the case at bar that we set it forth at length here. The court said:

"In the argument of the counsel for the defendant in error, the position is taken that the Bankrupt Act sus-

> pends the operation of the act of Ohio regulating the mode of administering assignments for the benefit of creditors, treating the latter as an insolvent law of the State. The answer is, that that statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or in terms even authorize, assignments; it assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced. It provides for the security of the creditors by exacting a bond from the trustees for the discharge of their duties; it requires them to file statements showing what they have done with the property; and affords in various ways the means of compelling them to carry out the purposes of the conveyance. There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment; it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory provision. The assignment in this case must, therefore, be regarded as though the statute of Ohio, to which reference is made, had no existence. There is an insolvent law in that State; but the assignment in question was not made in pursuance of any of its provisions. The position, therefore, of counsel, that the Bankrupt Law of Congress suspends all proceedings under the Insolvent Law of the State, has no application." (P. 502).

Counsel has attacked this decision (appellant's brief, pages 53 and 54) on the ground that the court in passing upon the questions involved did not consider the existence of the Ohio Statute. The language of the court however cannot be minimized by any such statement, and it is very clear that the court did consider the Ohio Statute and held that the provisions thereof were not substantially other than a court of chancery would apply in the absence of a statutory provision and that, therefore, the statute was proper. It is true as counsel states that under the statute here the assignment is

void while in the *Mayer* case, the assignment was valid, but at this stage of the proceeding we are not considering the assignment but the validity of the statute itself. No argument based on the proposition that the *assignment* in this case and the procedure followed by the assignee in this case was different from the assignement in the *Mayer* case and the procedure followed there can for a moment detract from the significance of the court's decision in the *Mayer* case with reference to the character and validity of the Ohio Statute. With reference to the argument as to the invalidity of the assignment here, a further discussion will be found at page 43 of this brief.

What is said in the *Mayer* case with respect to the Ohio Statute can equally be said here. The Wisconsin Statute, stripped of the discharge features is not an insolvent law in any proper sense of the term. It does not compel or in terms even authorize assignments; it assumes that such instruments were conveyances previously known and only prescribes a mode by which the trust created shall be enforced. It provides for the security of creditors by exacting a bond from the trustees for the discharge of their duties; it requires them to file statements showing what they have done with the property, and affords in various ways the means of compelling them to carry out the purposes of the conveyance. There is nothing in the act resembling an insolvent law. It does not discharge the debtor from arrest or imprisonment and it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. This description of the Wisconsin Act follows almost word for word the court's characterization of the Ohio Act in the *Mayer* case.

In the case of *Stellwagen* v. *Clum, supra,* the court was again confronted with the question of whether the Ohio Statute was suspended or superseded by the Bankruptcy Act and it answered the questions propounded by the Circuit Court of Appeals in the negative, squarely holding the Ohio Statute

to be proper. While the question arose in a somewhat different manner than the question is here presented to the court, the holding is squarely to the proposition that the Ohio Statute was valid and we take it that if it is valid for one purpose, it is valid for all purposes. Now it is to be noted that these two cases together with the other cases to which we have referred and particularly the case of *Boese* v. *King, supra,* and the case of *Segnitz* v. *Garden City Company,* 107 Wis. 171, 83 N. W. 327, in which the provisions of the Wisconsin Act itself were considered, were all cited with approval in the case of *International Shoe Company* v. *Pinkus,* 278 U. S. 261. That case is the case mainly relied upon by the appellant to sustain her position here. We submit that that case does not constitute in any manner a retreat from the earlier holdings of the court nor a modification of the general principles with respect to this question of the invasion of the field of bankruptcy by state legislation. It is to be noted that the *Mayer* case and the *Stellwagen* case were not only cited with approval by this court in the *Pinkus* case but further that this court did not in any way assume to distinguish or withdraw any of the statements which it had earlier made in those cases.

We repeat, the *Pinkus* case does not represent a retreat from the earlier holdings of the court. The court dealt in the *Pinkus* case with a statute of an entirely different type from that involved in these earlier cases, and from a statute entirely different than the Wisconsin Act. In the *Pinkus* case, the court holds that a statute of the State of Arkansas denominated an insolvency law and treated as such by the Supreme Court of that state, which statute provides for the administration of the estate of insolvents and the distribution of assets to those creditors and only those creditors who consent to the discharge of the debtor, constitutes an invasion of the field of bankruptcy and is superseded by the Federal Bankruptcy Act. It is to be noted that the court treated the

coercive feature of the act with respect to discharge just as though the statute itself in terms provided for discharge. The significant distinguishing features however lie in the fact that the Arkansas Act was a single enactment, was denominated an insolvency law, and has been construed and treated by the Arkansas courts in four cases as an insolvency law. The decision is not in any sense out of line with the principles theretofore established by the same court. The act in question involved elements not present in the Wisconsin act as we will hereinafter point out in detail and the only comfort counsel can draw from the case lies in the language of the court with respect to the general subject of bankruptcy laws. While in the *Pinkus* case, the court did refer to the distribution features of winding up proceedings as one of the essential elements of an insolvency law, it did not by any means say that any law containing such features and such features alone was an insolvency law. In fact the opinion clearly indicates that other features must be present before the court will consider an act to constitute an invasion of the field of bankruptcy. In any event as the court later pointed out in the case of *Straton v. New*, 283 U. S. 318, at page 331, the language of a case must be read in connection with the facts on which it was predicated.

Counsel also relies strongly upon the case of *Straton* v. *New*. We believe that far from supporting the position of counsel the *Straton* case constitutes a repudiation of their position. In that case one Alley obtained a judgment against a coal company in a West Virginia state court, and thereafter commenced a judgment creditor's suit seeking to administer certain property of the coal company and marshall the claims of those creditors having liens against such property. More than four months thereafter, a petition in bankruptcy was filed and the question confronting the court involved the validity of the state court proceedings, and the question of whether the federal court in the bankruptcy pro-

ceedings might enjoin further action in the creditor's suit. In a lengthy opinion, the court came to the conclusion that the federal court had no power to act; that the action of the state court was proper, and that the federal court might not interfere with the action of the state court. Here again, it is to be noted that the court in its opinion reviews the earlier cases and neither retreats from nor distinguishes them but relies upon them as establishing the principles applied by the court in that case. Particularly, it is to be noted that the court cited with approval the cases of *Mayer* v. *Hellman*, *Stellwagen* v. *Clum*, *In Re: Watts*, and *International Shoe Company* v. *Pinkus*, *supra*. The *Stellwagen* case and the *Watts* case were discussed at length by the court. The gist of the opinion is to be found in the quotation from the court's opinion hereinbefore set forth at page 23 of this brief.

Counsel have referred to a number of early federal court decisions. These cases are discussed at pages 30 to 35 of counsel's brief. We do not believe that they establish the principles contended for. The case of *In Re: Weedman Stave Company*, 199 Fed. 948, involved a statute of the State of Arkansas denominated an insolvency law, applying only in the event of insolvency, applying only to corporations, containing machinery for involuntary action and the appointment of a receiver at the instance of creditors. This is in no way similar to the Wisconsin Act.

In the case of *In Re: F. A. Hall Company*, 121 Fed. 992 (D. C. Conn.), the court had under consideration a statute of the State of Connecticut. All that is said is *obiter dicta* in view of the fact that the conflict arose where a petition in bankruptcy had been filed less than four months after the initiation of the state court proceedings. What is said however has no application here because the court was there dealing with a true insolvency law having application only to insolvents, denominated an insolvency law, and containing provisions for a limited discharge and provisions for exemptions to the debtor.

The Maryland Statute was under consideration in the case of *In Re: Storck Lumber Company,* 114 Fed. 360 (D. C. Md.). Here again, the court dealt with a true insolvency law providing for the filing of petitions in insolvency and containing involuntary features. The law related only to corporations and was similar in makeup to the insolvency law appearing as Chapter 335 of the Wisconsin Statutes, which is admittedly suspended. We do not find that there was any discussion of the necessity of discharge features in the court's opinion.

In the case of *In Re: Salmon,* 143 Fed. 395 (D. C. Mo.), the court had under consideration an insolvency law of the State of Missouri applying only to banks, and containing none of the features of a statute regulating voluntary assignments.

In the case of *Hammond* v. *Lyon Realty Company,* 59 Fed. (2nd) 592 (C. C. A. 4th Cir.), the court again dealt with a Maryland Statute which had been construed by the highest court of the State of Maryland in the case of *Hughes* v. *Hall,* 118 Md. 673, 85 Atl. 946, as an insolvency law. The statute under consideration had all of the elements present in the *Pinkus* case except the element of discharge. The statute in no way resembled the statute here under consideration. It is of interest however in view of counsel's interpretation of the language of this court in the *Pinkus* case, that the Circuit Court of Appeals said this:

> "But it is argued that this view must not be accepted literally because the Supreme Court in *Stellwagen* v. *Clum* and *International Shoe Company* v. *Pinkus, supra,* has emphasized the importance *of the discharge of the insolvent* from his debts in any system of bankruptcy law." Page 594.

The only federal court case cited by counsel which really supports their position is the case of *In Re: Smith,* 92 Fed. 135 (D. C. Ind.). In that case the court does clearly hold

suspended a statute of the State of Indiana which is in reality a measure regulating voluntary assignments. It is to be noted however that the opinion is *obiter dicta* because the petition in bankruptcy was filed within four months of the making of the assignment and that the court proceeds on the mistaken assumption that the statute related only to insolvent debtors when in point of fact the statute related to debtors in embarrassed or failing circumstances. It is also to be noted that the court starts with the proposition that because the Federal Bankruptcy Act makes an assignment for the benefit of creditors an act of bankruptcy, such assignment must be void, and draws from this the conclusion that a statute regulating voluntary assignments for the benefit of creditors is invalid. This premise upon which the whole decision is based is no longer tenable of course in view of the holding of this court in the case of *Randolph* v. *Scruggs*, 190 U. S. 533. The decision cannot be good law in view of the decision of this court in the case of *Mayer* v. *Hellman, supra.* In passing we call the court's attention to the fact that the law under consideration was denominated an insolvency law.

IV.

APPLICATION OF GENERAL PRINCIPLES TO THE WISCONSIN ACT.

In applying the general principles already discussed only those portions of the act relating to voluntary assignments for the benefit of creditors need be examined; the conclusion of the state court that other portions of the act are properly severable is final.

When we come to apply the general principles discussed to the Wisconsin Statute, we find the statute contains only one of the several elements of an insolvency law. At the outset it must be noted that we are dealing with a statute stripped of the discharge features carried into it by the enactment of 1889 and the involuntary features created by the legislature in 1897. The Supreme Court of Wisconsin has determined as a matter of legislative intent and statutory construction that these parts of the chapter are separable from those portions of the chapter relating to voluntary assignments. As we have pointed out that construction is binding upon this court and this court will only examine into the operation of the statute *as construed* by the state court. *Dorchy* v. *Kansas,* 264 U. S. 286. The presence of the severed portions of the chapter may be disregarded and the act now stands as it stood in 1885 except for the *saving clause* added in 1897—an act regulating voluntary assignments for the benefit of creditors. For the convenience of the court, we have set forth in bold face type in the appendix those portions of the act dealing with voluntary assignments for the benefit of creditors.

The act has been consistently characterized by the Supreme Court of Wisconsin as an act regulating assignments for the benefit of creditors.

The state court has consistently characterized the act as a law regulating voluntary assignments for the benefit of creditors and has expressly stated that it is not an insolvency law. *Pobreslo* v. *Joseph M. Boyd Company, et al.*, 242 N. W. 725 (this case); *In Re: Voluntary Assignment of Tarnowski*, 191 Wis. 279, 210 N. W. 836; *Binder* v. *McDonald*, 106 Wis. 332, 82 N. W. 156. While we do not contend that this characterization of the act is conclusive upon this court, this court has in other cases given weight to the characterization of a statute by the highest court of the state. *International Shoe Company* v. *Pinkus, supra; Clyde* v. *Gilchrist*, 262 U. S. 94; *Ward and Gow* v. *Krinsky*, 259 U. S. 503.

Those portions of the chapter relating to voluntary assignments for the benefit of creditors and held independent of the balance of the chapter and valid, contain no elements of a bankruptcy law except the element of ratable distribution of the debtor's property among his creditors.

The act contains no provision for discharge.

As we have pointed out, the statute stands before this court substantially in the form in which it existed in 1885, divested of any discharge feature and divested of the involuntary features created in 1897. In that form, it is significant that there is no provision by which the debtor may be discharged. The act applies to both individuals and corporations. It is quite true as stated by counsel at pages 35 to 37 of their brief that the discharge of a corporate debtor is of little consequence in view of the nature of the corporate entity, where the court is considering a statute applying only to corporations as in the case of *Exploration Mercantile*

Company v. *Pacific Hardware and Steel Company*, 177 Fed. 825 (C. C. A. 9th Cir.); but where as here the statute applies equally to corporations and individuals, the absence of a discharge feature is significant. We have been unable to find a single case in which this court has ever determined invalid a state statute dealing with and providing for the ratable distribution of a debtor's property among his creditors, *where the state enactment contained no discharge feature.*

The statute applies without regard to solvency or insolvency of the debtor.

The statute has application without reference to the solvency or insolvency of the debtor. Any individual or corporation may make an assignment for the benefit of creditors irrespective of his financial condition. Here again one of the most significant features of a bankruptcy law is absent. And in passing, we again call the court's attention to the fact that the alleged insolvency of this particular debtor is denied. (See this brief, page 4).

The statute contains no provision whereby involuntary proceedings may be initiated.

Construed as we believe the Supreme Court has construed this statute, we find that it contains no provision by which it may be invoked on behalf of a creditor and against the debtor. Another of the vital characteristics of an insolvency law is absent.

The statute is in form and substance a law regulating voluntary assignments; it is called into operation by the deed of the assignor.

The statute is in form and substance a law regulating voluntary assignments. While it is perfectly true as stated by counsel at pages 13 and 14 of their brief that the *procedure* is statutory as is the *method of distribution, In Re: Voluntary Assignment of Milwaukee Sheep and Wool Company,*

186 Wis. 320, 202 N. W. 693; *Segnitz* v. *Garden City Company*, 107 Wis. 171, 83 N. W. 327; it is equally true that the proceeding derives its impetus from the debtor and its potency from the deed of assignment and not from the law. The law does not create the proceeding but merely regulates it. *Mayfield Woolen Mills Company* v. *Goodrich and Martineau*, 189 Wis. 406, 207 N. W. 554. The distinction was ably brought out in the case of *In Re: Sievers*, 91 Fed. 366. The court there said:

> "Concerning these different contentions, it appears to me that there is a substantial difference between a proceeding under a general insolvency statute and one under a statute permitting general assignments. The one administers upon the estate of an insolvent from the law, winds up the estate judicially, and discharges the debtor. Such is essentially a proceeding in bankruptcy, and such is undoubtedly superseded by the Act of Congress in question * * *. The other derives its potency not from the law but from the contract or deed of the debtor, is administered under and according to the provisions of the deed, supplemented only by salutary legislative safeguards, and does not result in a discharge of the debtor from his obligations. This method of proceeding is not superseded by the Act of Congress in question." Page 368.

Counsel have called attention to the fact that the assignment in this case was void under the statute and, therefore, take the position that at least as to this assignment, the proceeding was more or less involuntary and takes its potency from the law and not from the deed of the assignor. Counsel state at page 50 of their brief:

> "The Boyd Company by making this void assignment brought itself automatically within the provisions of that chapter. As a penalty for an act which was in effect an act of bankruptcy, the entire estate of the insolvent Boyd Company was automatically thrown into the lap

of the court to be administered by an assignee appointed by the court without any reference whatsoever to the will or wishes of the assignor."

This is not a fair statement of the situation. The only section of the statute involved here is that portion of Section 128.06 which provides that no creditor shall in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, obtain priority over other creditors by a garnishment, upon such assignment being for any reason adjudged void. It is that portion of the section which counsel must establish is invalid in order to succeed. While it is true that the statute further provides that in such cases the property of the debtor shall be administered for the ratable benefit of creditors, the administration is by the assignee. This section was not inserted in the act as a penalty for the making of the assignment but was a measure enacted for the purpose of preventing an inequity and was in the interests of the debtor as well as creditors. It was enacted so that the purpose which was sought to be accomplished by the execution of an assignment should not fail because of a defect therein. The legislature might just as well have said that the provisions with reference to the filing of a bond by the assignee and the other provisions here involved were merely directory, because the practical operation of the statute is to lend validity to the assignment so that the property may be administered for the benefit of creditors even where the procedural requirements of the section have not been met.

Voluntary assignments in some form or other have existed since the relation of debtor and creditor first arose. They were recognized by the common law at a very early time and antedated bankruptcy legislation. It has been pointed out by the courts of Wisconsin that unless prohibited by statute, the right to make a voluntary assignment is inherent in a corporation and exists independently of statute. *Binder* v. *McDonald,* 106 Wis. 332, 82 N. W. 156; *Garden City Bank and*

Trust Company v. *Geilfus*, 86 Wis. 612, 57 N. W. 349. As the State Supreme Court well said in this case:

> "We perceive in the regulatory provisions of chapter 128, Statutes, relating to voluntary assignments for the benefit of creditors many provisions which operate to the benefit of both debtors and creditors. To strike down voluntary assignments for the benefit of creditors would be to destroy ancient, expeditious and well recognized proceedings which have proved of great value not only to insolvent debtors, to debtors not actually insolvent, but in financial distress, and to creditors." (R. 49).

See also *Randolph* v. *Scruggs*, 190 U. S. 533.

The statute was never intended as an insolvency law.

This statute was never intended by the legislature to be an insolvency law. The State of Wisconsin at all times had a complete and comprehensive insolvency law, so entitled, separate and apart from this enactment. It is to be noted that in characterizing the Ohio Act with respect to voluntary assignments, this court relied upon the fact that there existed in Ohio an insolvent law. *Mayer* v. *Hellman*, 91 U. S. 496, 502.

The differences between Chapter 128 as limited and construed by the Supreme Court of Wisconsin and the Federal Bankruptcy Act are of no consequence if Chapter 128 is not an insolvent law.

Counsel have at pages 40 to 48 of their brief enumerated points of difference between the Federal Bankruptcy Act and this statute providing for the administration of voluntary assignments. We do not consider that an indictment of the statute at all; rather, it clearly illustrates the fact that we are dealing with an enactment entirely outside the field of bankruptcy and dissimilar in every respect but one—the

ratable distribution of a debtor's property to his creditors. We fully concede the necessity of uniformity *within the field of bankruptcy,* but this statute would be suspended if it invaded that field whether its provisions were coincident with or in conflict with the provisions of the Bankruptcy Act. The essential fact remains that the element of distribution alone does not make a statute an insolvency law. *Straton* v. *New,* 283 U. S. 318; *Stellwagen* v. *Clum,* 245 U. S. 605. And if the enactment is not within the field of bankruptcy, distribution may well be on a different plane and in a different manner than that prescribed by the Federal Bankruptcy Act.

V.

THE QUESTION AS TO THE VALIDITY OF THE ASSIGNMENT AT COMMON LAW WAS NOT PASSED UPON BY THE SUPREME COURT OF WISCONSIN.

When this matter was tried before the Supreme Court of Wisconsin, the question of the validity of the assignment at common law and apart from the statute received attention. In the view taken by the State Court of the case, a determination of this issue was unnecessary. Thus we have a situation where the decision of the state court rests upon a federal ground although it might well have rested upon a non-federal ground. We take it the rule is well settled that where the decision of a state court turns both upon a federal and non-federal ground, the decision will be affirmed and this court will not examine into the correctness of the state court's decision upon the federal ground. *Petrie* v. *Nampa and Meridian Irrigation District,* 248 U. S. 154. Where however as here, the State Supreme Court took no position with reference to the non-federal ground although it might well have

based its decision upon that ground, we take it this court will inquire into the correctness of the state court's holding with reference to the federal ground. *Grayson* v. *Harris*, 267 U. S. 352. If, however, the court should take a different position than the state court took upon the federal ground, the state court should still have an opportunity to pass upon the non-federal questions urged upon it and the practice is to remand the case for further proceedings not inconsistent with the opinion of the Supreme Court. *Grayson* v. *Harris, supra.*

Thus in the case at bar, if the court should conclude adversely to the contention of the respondents upon the federal question involved, the case ought to be remanded for further proceedings by the State Supreme Court. We assume that the court is not interested in any argument with respect to the non-federal ground relied upon by the respondents in the court below. For the court's information, however, there will be found in Appendix B attached to this brief a recapitulation of the argument made by respondents upon this branch of the case in the court below.

VI.

THE COURT SHOULD NOT LEND ITS AID TO THE PLAINTIFF IN THIS ACTION.

With reference to the general approach to the question presented, we cannot close without calling attention to another phase of the case of *Boese* v. *King*, 108 U. S. 379. We submit that the idea that the plaintiffs shall by this action secure a preference over other creditors of The Joseph M. Boyd Company is an idea abhorent to the law. This matter of preferences has received much attention from the Legislature and from the courts and has universally been condemned. A great deal of legislation in Wisconsin and elsewhere has come into

being as the sole result of a desire to provide for an equitable and pro rata distribution of the assets of insolvents among creditors of the same class; and to permit the plaintiff by her action here to secure a preference is a step that should appeal to the court as being improper. There is substantial authority for the proposition that on that ground alone this action should not be sanctioned, for in the case of *Boese* v. *King, supra,* cited with approval in the *Pinkus* case, this court said in its opinion:

> "It can hardly be that the court is obliged to lend its aid to those who neglecting or refusing to avail themselves of the provisions of the Act of Congress, seek to accomplish ends inconsistent with that equality among creditors which those provisions were designed to secure." (Page 386).

While in the *Pinkus* case such a procedure was permitted, the court distinguished the situation from that presented in the *Boese* case calling attention to the fact that the plaintiff in the *Pinkus* case *could not* invoke the jurisdiction of the Bankruptcy Court, because the debtor in that case had within six years prior thereto received a discharge in bankruptcy. The court specifically stated that the insolvent had there commenced proceedings under the Arkansas Insolvency Law on the day the judgment was obtained against him, and that his purpose was to delay the plaintiff and secure a full discharge as provided by the state statute. No such situation exists in the cases at bar. While the plaintiff has pleaded that she would have invoked the jurisdiction of the Bankruptcy Court, had she been able to secure the cooperation of a sufficient number of qualified creditors, the situation presented in the Pinkus case is not involved, for here it cannot be said that the purpose of The Joseph M. Boyd Company in making this assignment was to delay the plaintiff and secure a discharge. The assignment was made more than four months before these actions were commenced, and the dis-

charge feature of Chapter 128 had been held inoperative before the circuit court was asked to take jurisdiction of the voluntary assignment. We think the case comes squarely within the rule of the *Boese* case, and that this court should not lend its aid to the plaintiff to accomplish an end inconsistent with equality among creditors.

CONCLUSION

In conclusion, therefore, it is our position that this action is forbidden by Section 128.06 Wisconsin Statutes; that this court in examining into the validity of Chapter 128 of the Wisconsin Statutes must take the statute as the State Supreme Court has construed it; that the state court has declared in favor of the severability of those portions of Chapter 128 dealing with voluntary assignments for the benefit of creditors, and including the provisions of Section 128.06; that so construed the statute is valid and proper, and under the well settled principles of this court does not contain the essential characteristics of a bankruptcy act, and does not constitute an invasion of the field of bankruptcy; that if the saving clause in Section 128.06 constitutes an invasion of the field of bankruptcy, the foundations upon which such a holding must be based would inevitably compel a repudiation of the entire chapter including that portion of the section voiding common law assignments; that in such case the assignment here is valid as a common law assignment; that inasmuch as the state court deemed it unnecessary to pass upon this issue although the issue exists in the case and may be a non-federal ground upon which the decision of the court might well be sustained, the state court ought still to be permitted to pass upon that issue; and finally that in any event plaintiff has a remedy of which she might have availed herself and when it appears that she has not done so the court

will not lend its aid in bringing about a result at variance with the equitable distribution contemplated by the state and federal enactments upon the subject.

We therefore respectfully submit that the judgment and order of the Supreme Court of the State of Wisconsin be affirmed.

Respectfully submitted,

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APPENDIX A

Those portions of the statute relating to voluntary assignments for the benefit of creditors are printed in bold face type.

CHAPTER 128.

VOLUNTARY ASSIGNMENTS

128.01 Supervision of.—The circuit court or the judge thereof in vacation shall have supervision of the proceedings in all voluntary assignments made under the provisions of this chapter and may make all necessary orders for the execution of the same.

128.02 Executions, judgment notes, preferences void.—Every levy of an execution made under a judgment confessed against an insolvent debtor within sixty days prior to his making an assignment for the benefit of creditors or under a judgment entered on a judgment note made by any such debtor within sixty days prior to his making such an assignment and the lien of any such judgment upon real estate shall be void and of no effect. Every sale, mortgage, hypothecation, lien or other security, of whatever name or nature, made, given or executed of or upon the real or personal property of any such debtor within sixty days prior to the making of such an assignment and in contemplation of the making thereof or of his insolvency shall be void and of no effect if the vendee in such sale or the person benefited thereby or by the execution of the mortgage, hypothecation, lien or other security knew or had reasonable cause to believe that such debtor was insolvent. All such assignments which shall contain or give any preference to one creditor over another, except for the wages of laborers, servants and employes earned within six months prior to the making thereof, shall be void as to the preference, but valid for all other purposes. Such void preferences shall be in-

valid as well in respect to creditors proving under the assignment as all others objecting thereto.

128.03 Powers of assignee; traverse; preference; rights of creditors; inspection of books; evidence.—The assignee shall possess all the power necessary to institute any action or proceeding to set aside and avoid any levy, sale, mortgage, hypothecation, lien or other security made, given or executed contrary to the provisions of the preceding section; and if any writ of attachment shall be levied upon the property of the assignor within sixty days prior to the execution of such assignment the assignee may appear in the action in which it issued and in the name of the assignor traverse the affidavit of attachment or any part thereof, and the verification of the answer traversing such affidavit shall be sufficient if made upon information and belief. A judgment obtained, an attachment levied or a garnishment made in collusion with a debtor shall be deemed a security given by him within the meaning of this section. All costs and expenses incurred by the assignee in any such action or proceeding shall be paid out of the estate of the assignor after the allowance thereof by the court, which may exercise its discretion in allowing the same. If the assignee shall neglect for sixty days after the execution of the assignment to institute an action or proceeding as herein provided any creditor of the assignor who has duly proved his claim, whether entitled to participate or not, may institute and prosecute to judgment any such action or proceeding in the name of the assignee and for his benefit, upon executing to the latter a bond in the sum of one thousand dollars, with two or more sureties, freeholders of this state, conditioned to hold said assignee harmless from any loss, cost or expenses which will result by the determination of the action or proceeding adversely to him. If there shall be a recovery the creditor who prosecutes the action or proceeding shall be allowed out of the estate all reasonable costs and charges paid or incurred therein, which shall be fixed by the court. The assignee or any such

creditor may, upon application to the proper circuit judge, the county judge or a court commissioner of the county where the assignment is filed, have an order for the inspection of the books of the assignor and his examination and that of other witnesses upon oath before the officer issuing such order as to the business affairs and condition of the assignor before and after the making of the assignment as to all matters pertaining to the assigned property and the assignor's indebtedness. The parties named in such order, after service of a copy thereof, shall attend at the time and place mentioned therein and submit to such examination, and their attendance may be compelled in the manner provided by law. If such examination is held at the instance of the assignee the expense thereof shall be chargeable to the estate; otherwise at the expense of the creditor or the estate as the officer before whom it is held shall determine and certify that it was instituted for the benefit of the creditors of the assignor or for other reasons.

128.04 Rights of assignee to maintain action to avoid fraudulent conveyances.—In all cases of voluntary assignment for the benefit of creditors made under the provisions of the laws of this state the assignee or assignees shall be considered as representing the rights and interests of the creditors of the debtor or debtors making the assignment, as against all transfers and conveyances of property and all liens or charges thereon which would be held to be fraudulent or void as to creditors and shall have all the rights which such creditors would have to bring and maintain an action to avoid said fraudulent conveyances and transfers.

128.05 When an assignee neglects to bring action, rights of creditor; bond, etc.—Whenever any insolvent debtor has made any conveyance or transfer of his property, with the intent to hinder, delay or defraud his creditors, or has made or suffered any conveyance, transfer or charge upon his property, which is void, by reason of being preferential or otherwise, and shall

thereafter make a general assignment for the benefit of his creditors; it shall be lawful for such assignee or his successors to commence and prosecute to judgment any proper suit or suits to vacate such fraudulent conveyance, transfer or charge. If the assignee named in such assignment or his successor, shall neglect for thirty days after the making thereof, to institute proper suit or suits to vacate such fraudulent or preferential conveyance, transfer or charge, it shall be lawful for any creditor of the assignor to institute and prosecute to judgment any such suit in the name of the assignee and for his benefit, upon giving to the assignee a bond in the sum of not less than five hundred dollars with sufficient surety resident of this state to hold the said assignee harmless from all costs or expenses to arise or accrue to him in case said suit shall be decided adversely to him; said bond to be approved by the judge of the court in which such action is to be brought. In case of recovery in such action the creditor so prosecuting the same shall be allowed out of the estate all reasonable costs and charges which he has paid or become liable to pay in prosecution of such suit or suits; such costs and expenses to be determined by the court.

128.06 Assignment, how executed; bond, mistakes; amendments; ratable distribution.—All voluntary assignments or transfers whatever of any real estate, chattels real, goods or chattels, rights, credits, moneys or effects for the benefit of or in trust for creditors shall be void as against the creditors of the person making the same unless the assignee shall be a resident of this state and shall, before taking possession of the property assigned and before taking upon himself any trust conferred upon him by the instrument of assignment, deliver to the county judge or court commissioner of the county in which such assignor or some one of the assignors at the time of the execution of such assignment shall reside, not being a creditor of such assignor, a bond duly executed to the clerk of the circuit court of the county by his name of office as obligee

in a sum not less than the present value of the assets of such assignor, which value shall be ascertained by the oath of one or more witnesses and of the assignors, with two or more sufficient sureties, freeholders of this state, who shall each testify to his responsibility and by their several affidavits satisfy the officer taking such bond that the property of such sureties, being within this state, is worth in the aggregate the sum specified therein; and the bond shall be conditioned that such assignee shall faithfully discharge the several trusts reposed in him by such assignment and diligently and faithfully collect and reduce to money the property assigned to him and account for and pay over to the several parties, then being creditors of the assignor, all moneys that shall come into his hands from the effects of such assignor after deducting the necessary expenses of performing the several trusts mentioned in the assignment, as settled and allowed by the circuit court, and abide the order of said court. But no assignment shall be void because of any defect, informality or mistake therein or in the bond, inventory or list of creditors accompanying the same; and the court or judge may direct the amendment of the assignment or of any other such paper to effect the intention of the assignor or assignee, and any such amendment shall relate back to the time of the execution of the paper to which it is made. No mistake in filing a copy instead of an original or any like mistake or inadvertent failure to comply with the provisions of this chapter shall avoid the assignment. No creditor shall, in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, or in case of the insolvency of any debtor, by attachment, garnishment or otherwise, obtain priority over other creditors upon such assignment being for any reason adjudged void, or in consequence of any sale, lien or security being adjudged void; but in all such cases the property of such insolvent debtor shall be administered for the ratable benefit of all his creditors under the direction of the court by the assignee or by any receiver of said property and estate appointed as hereinafter provided.

128.07 Attachment; assignment.—Whenever the property of an insolvent debtor is attached or levied upon by virtue of any process in favor of a creditor or a garnishment is made against such a debtor he may, within ten days thereafter, make an assignment of all his property and estate, not exempt, for the equal benefit of all his creditors, whereupon all such attachments, levies, garnishments or other processes shall be dissolved and the property attached or levied upon shall be turned over to such assignee or receiver.

128.08 **Preferences; receivership.**—When any debtor, being insolvent, shall confess judgment or do any act or make any conveyance whereby one or more of his creditors shall obtain a preference over any other of his creditors or shall omit to do any act which he might lawfully do to prevent any of his creditors from obtaining preference over his other creditors, contrary to the intent of this chapter, or if he shall not, within ten days after any levy by attachment, execution or garnishment made against him, make an assignment of all his property, as provided in the next foregoing section, or within such time in good faith institute proceedings to vacate the attachment, execution or garnishment, or secure a release of such levy or defend against the said levy, then, or within thirty days thereafter, any two or more of his creditors holding and owning debts or claims of not less than two hundred dollars in the aggregate may make a petition to the circuit court or a judge thereof in the county or circuit where such debtor resides, if a resident of this state, and if not, in any county thereof, setting forth therein such matters and facts as may be pertinent, and after notice given in such manner as the court or judge may direct to the debtor and creditors sought to be preferred or to their attorney of record, of the time and place of hearing, the court in term time or a judge in vacation shall proceed summarily upon such petition to hear the parties and receive such evidence as may be proper, and if it shall appear to the court or judge that the debtor is insolvent and has given

a preference to any of his creditors over other of his creditors or any of them, or has refused or neglected to make an assignment of his property as hereinbefore provided, the court or judge shall appoint a receiver who shall take possession of all the debtor's property, evidences of property or indebtedness, books, papers, debts, choses in action and estate of every kind, including property attached or levied upon or garnished in the manner and subject to the limitations herein provided and of all property conveyed in violation of the provisions of this chapter, and have charge and control of the same, and of all debts or property garnished, except property exempt by law, and convert the same into money and distribute the same pro rata among the creditors having valid claims due or to become due who shall prove their claims within such time and manner as the court or judge shall direct; and the court or judge shall order the debtor to file a correct inventory of his assets and a list of his creditors as provided in section 128.13; such receiver shall be appointed and all proceedings shall be had under these statutes relating to receivers, and the court or judge may order or direct such debtor to do or refrain from doing whatsoever is necessary and proper to carry this chapter into effect. The provisions of this chapter shall not apply to any payment or satisfaction, in whole or in part, of a past-due debt made in the usual course of business without any intent on the part of the creditor to evade the same. The same proceedings may be taken and with like effect under the provisions of this section by such insolvent debtor for a discharge from his indebtedness as if said debtor had made a voluntary assignment under this chapter.

128.09 Definition of insolvency; time.—An insolvent person, within the meaning of this chapter, is one whose nonexempt property is insufficient in amount, at a fair valuation, to pay his debts; and when insolvency is to be inquired into, with reference to this chapter, it shall be determined as of the date of the making or attempting to make an assignment or of the

giving or attempting to give any preference prohibited hereby, the issuing of an execution or attachment or the institution of garnishment proceedings against the debtor's property.

128.10 **Provisional remedies.**—In all actions authorized by this chapter appropriate provisional remedies may be had and final relief administered to the equal distribution of all assets recovered among the creditors of the debtor, and the court may make such orders for the payment of costs and expenses as may be just. An action or proceeding authorized herein for the benefit of all creditors may be taken by a creditor although his demand is not due at the commencement thereof.

128.11 **Filing bond; new bond.**—Such bond shall, immediately after its execution, together with a full and true copy of such assignment, be filed by the officer taking the same in the office of the clerk of the circuit court to whom it is executed; and the taking and filing of said bond by said court commissioner or county judge shall be deemed a sufficient approval thereof, and all bonds so taken and filed are hereby declared to be sufficiently approved. Such bond and copy of assignment shall be kept by such clerk in his office, subject at all times to the inspection of all parties interested; and any creditor of the assignor may maintain an action thereon in the name of the obligee at any time for condition broken, and any judgment rendered thereon shall be held and collected for the benefit of the respective creditors of the assignor according to law and the terms and conditions of such assignment. The court may, from time to time, require the assignee to furnish a new or additional bond.

128.12 **Assignee's consent, how shown.**—The assignees named in such assignment shall each, in the presence of the officer taking such bond, before delivering the copy of such assignment to said officer for the purpose specified in the preceding section, indorse in writing on such copy their consent to take upon themselves the faithful discharge of the several

trusts specified in the assignment, and that the said copy so indorsed by them is a true and correct copy of the original; and such officer shall indorse thereon his certificate that the same is a true copy of the original and of the whole thereof, and that the said assignees named in such original assignment did in his presence make the indorsement thereon as required by this section. Said true copy so indorsed, or a duly certified copy thereof may be recorded in the office of the register of deeds of any county wherein lands are conveyed by such assignment in the same manner and with the same effect as other conveyances; and any such record heretofore made is hereby declared to be and to have been legal and valid, and shall be receivable in evidence with the same force and effect as the record of other conveyances.

128.13 Inventory of assets.—Within twenty days after the execution of the assignment the assignor shall also make and file in the office of said clerk a correct inventory of his assets and a list of his creditors, stating the place of residence of each such creditor and the amount due to each, which inventory and list shall each be verified by his oath and have affixed a certificate of the assignee that the same is correct according to his best knowledge and belief; but no mistake therein shall invalidate such assignment or affect the right of any creditor.

128.14 Notice to creditors.—Within twenty-two days after the execution of the assignment the assignee shall give notice of the making thereof and of his post-office address and that every creditor of such assignor is required to file, within three months, with such assignee or the clerk of the circuit court, naming him and his post-office address, on pain of being debarred a dividend, an affidavit setting forth his name, residence and post-office address, the nature, consideration and amount of his debt claimed by him, over and above all offsets. Such notice shall be given by publishing the same once in each week for three successive weeks in a newspaper in the county,

or, if none, in an adjoining county, and by mailing a copy of such notice to each creditor at his residence of whom the assignee shall have information.

128.15 Proof of notice; objections to claims; appeal; bill of exceptions.—At the expiration of three months from the first publication of such notice the assignee shall file with such clerk proof of the publication and a list of the creditors to whom such notice was mailed, with the dates thereof respectively, verified by his affidavit; and also a list of the creditors from whom affidavits of claims have been received by himself or such clerk, stating their names, residences and amounts claimed respectively, together with all affidavits of claims by him received. At any time within thirty days after such list is filed the assignee or any creditor may file written objections, specifying the grounds thereof, to the whole or any part of any debt claimed by any creditor, and serve a copy thereof upon such creditor as a summons of the circuit court is served, if a resident of this state, and in other cases in such manner as shall be fixed by order of the court or a judge thereof. Depositions may thereafter be taken as in civil actions. The circuit judge on application of either party shall fix by order a time when such objections shall be heard by the court or such judge, which shall be served as therein prescribed on the other party, and may from time to time adjourn the hearing, and may in his discretion award a trial by jury. Upon the final hearing the court or judge shall make such order as shall be just, and may compel the payment of costs in the discretion of the judge. An appeal may be taken from such order within thirty days from the entry thereof, but not afterwards, in the manner provided for taking appeals from orders in civil actions, and a bill of exceptions may be settled thereon as in other cases.

128.16 Creditors, when barred; what debts provable, how paid; taxes; labor.—Every creditor of the assignor who shall not file such an affidavit of his claim within the time limited

as aforesaid shall not participate in any dividends made before his claim is filed. Debts to become due as well as debts due may be proved, a rebate of interest being made to the time of dividend on such as do not bear interest and interest being computed, when demandable, upon others to the time of dividend. The assignee may pay, or the court may order a dividend to be paid, at any time, making such provision as shall be necessary for the protection of claims in dispute. But before making any dividend the assignee shall pay all taxes assessed upon the property assigned, which remain unpaid, and the compensation due all laborers, servants and employes for labor or personal services performed for the assignor within the six months next preceding the making of the assignment, the claims for which shall be paid by him next after the payment of unpaid taxes and assessments, debts due the United States or this state, the expenses of the assignment and the execution of the trust.

128.17 Settlement of assignee's accounts.—Every assignee who shall accept the assignment of any property under the provisions of this chapter or who has heretofore accepted his trust and has not settled the same shall, within six months thereafter or within such further time, not exceeding one year, as the court or judge shall allow, file with the clerk a full and itemized statement, verified by his oath, of the property by him received, the manner of his dealing therewith, the amount of money realized by him, the condition of the property and funds in his possession, the names and residences of the assignor's creditors, the dividends paid them, his receipts and disbursements, with his claim for compensation; provided, that if the court or judge shall decide that special reasons for further delay exist the time for such settlement may be further extended as the court or judge may order. If any such assignee shall neglect so to do or to promptly apply for a settlement of his account the court or judge may, upon application of any such creditor, compel the making and filing of such ac-

count or settlement thereof by order, and in such case the assignee may be denied, in the discretion of the court or judge, any compensation. Upon filing such report such assignee may apply to the court, upon not less than twenty days' notice thereof by mail to the respective creditors named therein, for a final settlement of such account; and at the time and place named the circuit court shall hear any objections made by any creditor, take such evidence as may be proper, and settle and adjust such accounts and the compensation and expenses of such assignee, whether objection be made or not, as shall be just; and his order thereupon shall be conclusive upon all parties, including the sureties of the assignee; but the assignee or any creditor may cause a bill of exceptions to be settled and appeal from such order within six months from the entry thereof to the supreme court in the manner prescribed for appeals in civil actions, except that the assignee may file his notice and undertaking with the clerk without other service thereof. At any time after the expiration of three months from the publication of the notice mentioned in section 128.15 the assignee may file with the court a receipt in full or release executed by all the creditors of the assignor who have filed an affidavit or proof of their claims as required by section 128.14, up to the time of such application, together with the written consent of the assignor, and apply to the court for his discharge as assignee, which application shall be granted; and the court shall make an order requiring the assignee to deliver all property held by him as such assignee to the assignor, provided the assignor shall pay his fees and expenses and the costs of court, and thereupon the assignee shall be released and discharged from all liability to the creditors of the assignor for any moneys or property coming to his hands as such.

128.18 Removal of assignee.—The circuit judge may, upon notice and after a hearing, remove any assignee who is shown to be incompetent, or to have become disqualified, or to have wasted or misapplied any of the trust estate, and shall also re-

move any such assignee upon the application of a majority of the creditors of such assignor who shall also represent a majority in value of the debts against said estate, and compel by order a settlement of his account and surrender of the estate to his successor, and shall appoint the person named in such petition or some suitable person as his successor, who shall qualify in the same manner provided by law for the assignee appointed by the instrument of assignment; and in place of any assignee who shall die or be removed may appoint another, who shall give like bond and be subject to like duties and responsibilities as to the estate remaining undisposed of and proceedings remaining to be taken as if appointed by the instrument of assignment.

128.19 Whom discharged.—Any person who shall have made a voluntary assignment for the benefit of his creditors under or in pursuance of this chapter may be discharged from his debts as a part of the proceedings under such assignment upon compliance with the following provisions.

128.20 Application, how made.—Such insolvent debtor who shall desire to be discharged from his debts shall, within one year after filing a copy of his assignment in the office of the clerk of the circuit court and before the final settlement of the accounts of the assignee under his assignment, file in the office of the clerk of the circuit court where such assignment is filed and present to such circuit court or to the presiding judge thereof his application for such discharge, addressed to said court or judge, in which application he shall state the date of filing of such assignment, the clerk's office where the same is filed, the name and post-office address of the clerk with whom the same is filed and the name and post-office address of the assignee named in such assignment.

128.21 Verification.—Said insolvent debtor shall sign said application and annex thereto an affidavit subscribed and sworn to by him, substantially in the following form:

STATE OF WISCONSIN, } ss.
County of_____ }

I, _____, do solemnly swear (or affirm) that I have read (or heard read) the foregoing application signed by me; that the same is true of my own knowledge; that the inventory of my estate and the list of my creditors, filed in the office of the clerk of the circuit court for the county of_____as a part of my assignment, are as accurate and complete statements of all my property, except such as is exempt from sale on execution, and of my creditors as I can make; that I have not at any time or in any manner whatsoever disposed of or made over any part of my estate for the benefit of myself or of my family or in order to defraud any of my creditors; that I have in no instance created or acknowledge a debt for a greater sum than I honestly or truly owed, and that I have not paid, secured to be paid, nor in any way compounded with any of my creditors with a view to fraudulently obtain the discharge prayed for in the foregoing application.

128.22 Showing cause against discharge; hearing; service. —Upon filing and presenting such application as hereinbefore required the court or judge to whom it is presented shall make an order, entitled in the matter of such assignment, requiring all the creditors of such debtor to show cause, if any they have, why such debtor should not be discharged from his debts. Such order shall refer to said assignment and state the time and place of the filing thereof, the name and post-office address of the clerk in whose office the same is filed, the name and address of the assignee named in such assignment and the time and place of the filing of such application. If such application is made to such court such order shall also fix a day in the same or the next ensuing term for a hearing thereof at the court-house or at the chambers of such judge, designating the place thereof, and shall also require a copy of such order be published in a newspaper published in the county in which the

application was made, if there be one, and if not, then in a newspaper published in an adjoining county, for at least six successive weeks prior to the day of hearing; and also direct that a copy of such application and of said order be, within five days from the date of such order, deposited in the post-office, postpaid, directed to each of the creditors of such insolvent debtor whose address is known to him; but if a copartnership be a creditor it shall not be necessary to mail a copy of such application and of such order to each member thereof, but it shall be sufficient if a copy of each be so deposited and directed to such copartnership in its firm name or designation.

128.23 Proof; jury trial.—On the day fixed in such order or at any subsequent day or time that such judge or court may appoint such judge or court shall hear the proofs and allegations of the parties, and before any other proceeding be had shall require proof of the publication of said order and of the mailing of a copy of said application and order as in said order required. On such hearing the application shall be regarded as a complaint, and any creditor of said debtor who may desire to object to his discharge may file in the office of the clerk of said court and present on such hearing his answer to such application, verified as pleadings are required to be verified, setting forth the grounds of his objection to such discharge. Every creditor opposing such discharge may, at the time appointed for the first hearing, demand of the court or judge that the cause be heard and tried by a jury and shall be entitled to an order to that effect, and in all cases ordered to be so tried such trial shall be had in the county where such debtor shall reside, subject to a change of the place of trial for like causes and according to the provisions which govern in actions pending in the circuit court. If such demand is made to such court the jury shall be drawn in the same manner as in civil cases from the jurors summoned and attending such court, who shall be sworn as prescribed in the next section.

128.24 Venire; verdict; disagreement; adverse examination.—If such demand is made to such judge he shall name eighteen freeholders of the county, qualified by law to serve as jurors, and issue a summons to the sheriff or some constable commanding him to summon the persons so named to appear before him at such courthouse or at his chambers, designating them, at a day fixed in such summons, not less than six nor more than twelve days from the time of issuing the same, at which time and place twelve of such persons shall be drawn to serve as a jury in the same manner as juries in circuit court are drawn, and who shall be sworn well and truly to hear, try and determine the validity of the objections so specified. There shall be but one hearing before a jury unless a retrial is granted, and if they cannot agree they shall be discharged, and such court or judge shall decide the merits of such application and objections thereto in the same manner as if no jury had been called. At the hearing on any such application, before a jury or otherwise, the debtor may be examined on oath at the instance of any creditor touching his estate or debts or as to any matter stated in his application, and any such creditor may contradict or impeach by other competent evidence any testimony given by such insolvent debtor.

128.25 Discharge.—Every creditor of such debtor, whether residing within or without this state, who shall file an affidavit or make other proof of his claim against such debtor or receive any dividend from his assignee or out of his estate or shall in any way participate in the proceedings under such assignment shall be deemed to be a party to the proceedings for a discharge of such insolvent debtor from his debts, and the filing of such affidavit, the making such proof of claim, receiving such dividend or participation in such proceedings shall be deemed and is declared to be an appearance in the matter of such assignment and application for a discharge, and the order and discharge made and granted shall be final and binding upon all of such creditors, subject to their right to appeal, from

any order, decision or judgment made or entered in such proceeding, in the manner provided by law. If it shall appear upon such hearing or trial that such debtor has in good faith made a voluntary assignment for the benefit of his creditors and has in all respects complied with the law in relation to such assignments, and with the provisions of the five preceding sections such court or judge shall grant such debtor a discharge from his debts, which shall have the effect herein declared.

128.26 **Judgment; effect of discharge.**—Upon the granting of such discharge the clerk of said court shall immediately enter judgment in the judgment docket thereof against said debtor and in favor of each of his creditors who appears, by the list filed with his assignment, to be a resident of this state and in favor of each of the creditors of said debtor whose residence appears by such list to be out of the state and who has proved his claim against said debtor under such assignment or appeared in the proceedings under such assignment, or received any dividend from the assignee of such debtor, or out of his estate, or in any way participated in the proceedings under such assignment, or who has appeared in the proceedings for such discharge for the sum respectively appearing or shown to be due and allowed to him in the proceedings under such assignment, and shall also enter a discharge thereof upon such docket by order of said court, which shall discharge such debtor from all personal liability in favor of such creditors as are in this section indicated. Said clerk shall be entitled to receive a fee of five dollars for docketing and discharging such judgment. In any action brought against such debtor by any creditor who has done either of the things mentioned in this section a discharge granted pursuant to the preceding provisions may be pleaded and shall be a bar to the recovery against him for or on account of any indebtedness or liability of his found due in such proceedings and included in said judgment so entered and discharged.

128.27 Appeals.—Appeals may be taken to the supreme court by such insolvent debtor or by any creditor from any order or judgment made or entered in such proceeding, within the time and in the manner as appeals in ordinary civil actions, and whenever necessary bills of exceptions may be settled as on such appeals.

128.28 Discharge of partners; application.—In all cases where a partnership shall have made a voluntary assignment for the benefit of its creditors any member of such partnership who has no property or effects not exempt from execution may be discharged from all his liabilities as such member in the proceedings on the assignment of such partnership upon filing his application for a discharge as herein provided. Such person shall state in his application the existence of such partnership, the name and post-office address of each partner, the making of the assignment, the name and post-office address of the assignee named in such assignment, the date of the filing of such assignment, the name and post-office address of the clerk in whose office the same is filed and that he has no property or effects of any kind not exempt from execution. Such applicant shall annex to such application his affidavit, subscribed and sworn by him, in substantially the following form:

STATE OF WISCONSIN, }
County of---------- } ss.

I, ----------, do solemnly swear (or affirm) that I have read (or heard read) the aforegoing application signed by me; that the same is true of my own knowledge; that the inventory of the estate of the partnership therein mentioned and the list of the creditors of such partnership, filed in the office of the clerk of the circuit court for the county of------ as a part of the assignment of said partnership, are as accurate and complete statements of the property and creditors of said partnership as I can make; that I have no property or estate of any kind not exempt from execution; that I have not at any time

or in any manner whatsoever disposed of or made over any part of my estate for the benefit of myself or my family in order to defraud any of my creditors, and that I have in no instance created or acknowledged a debt for a greater sum than I honestly or truly owed, and that I have not paid, secured to be paid or in any way compounded with any of my creditors or the creditors of said partnership with a view to fraudulently obtain the discharge prayed for in the foregoing petition.

128.20 Effect of discharge.—The discharge granted to any member of any partnership may be pleaded in any action brought against him on any indebtedness against said partnership in the same manner and with the same force and effect as hereinbefore provided, and the same shall constitute a bar to a recovery against him for or on account of any indebtedness or liability of his as a member of such partnership.

APPENDIX B

The Assignment Is Valid As A Common Law Assignment.

If the appellees are correct in their position that Chapter 128 of the Statutes is superseded by the Bankruptcy Act, then it is the position of the appellants that nevertheless the assignment is valid as a common law assignment. We have already adverted to the fact that the right to assign property for the benefit of creditors is a right inherent in the ownership of property, and a right which corporations may exercise as well as any private individual. Whether or not the assignment was intended originally as a common law assignment does not seem to us to make any difference if Chapter 128 has been superseded by the Bankruptcy Act. The fact remains, however, that while the order of the court assumes to take jurisdiction under Chapter 128, it is clear from the answer filed by the garnishee containing the original assign-

ment, the petition to the court, the order of the court assuming jurisdiction, and the amended assignment, that an exact compliance with the provisions of that chapter was not contemplated either by the parties to the assignment or by the court for we find the court setting a different bond than that required by the statute, and providing for a different period of time within which the inventory was required to be filed than that called for by the statute, and we find the very terms of the assignment and particularly the amended assignment inconsistent with an exact compliance with the statute.

Some argument was addressed to the trial court by the appellees directed to the proposition that the Federal Bankruptcy Act constitutes such an invasion of the field as to suspend and supersede voluntary assignments for the benefit of creditors at common law as well as statutory enactments of the character of Chapter 128. It seems to us that this is so obviously erroneous as to require only a very brief answer. The mere fact that the Bankruptcy Act makes the execution of a voluntary assignment an act of bankruptcy voidable within four months by the filing of a petition certainly shows an intention to regard assignments for the benefit of creditors at common law as valid and proper, and not inconsistent with the Bankruptcy Act or an invasion of the field of bankruptcy. If this were not enough, we find that the courts have repeatedly sustained assignments for the benefit of creditors as proper. *Mayer* v. *Hellman, supra.*

Considered as a common law assignment, it is urged by the appellees that the assignment is invalid because (a) it limits the liability of the trustees (b) it authorizes a sale of assets on credit, and (c) it authorizes the continuance of the business and the incurring of expenses and the mortgaging of property. In the trial court counsel cited the cases of *Hutchinson* v. *Lord,* 1 Wis. 286; *Keep* v. *Sanderson,* 2 Wis. 42; *Norton* v. *Kearney,* 10 Wis. 433, and *Vernon* v. *Upson,* 60 Wis. 418. We frankly concede that these cases do tend to

substantiate the point made by the appellees. The trial court in passing upon this feature of the case cited the case of *Vernon* v. *Upson, supra*, and relied upon it. It is our opinion, however, that none of these cases should be followed at the present time.

The decision of the court in these cases was based solely on the proposition that a provision in the instrument of assignment limiting the liability of the trustees, authorizing the sale of assets on credit, and authorizing the continuance of the business, had a tendency to hinder and delay creditors and was, as the court put it in one of the cases, "a badge of fraud," and therefore in violation of the Statute of Frauds. Now the Statute of Frauds provided in substance then as it does now that "every conveyance * * * made with the intent to hinder, delay or defraud creditors * * * is fraudulent." *Sec. 242.07.* It was on the theory that an assignment for the benefit of creditors containing such a provision evidenced an intent to hinder or delay creditors that these assignments were held invalid. All of these cases with the exception of the case of *Vernon* v. *Upson* were decided prior to the enactment of Chapter 80, and the case of *Vernon* v. *Upson* was decided prior to those amendments inserted in Chapter 80 which evidenced the intention of the Legislature to provide a scheme for the administration of property voluntarily assigned which might involve the carrying on of a business. It is our position that with the enactment of this statute which clearly contemplates the possible sale of assets on credit and the continuance of a business, is no longer possible to say that an instrument of assignment which permits these things to be done *evidences an intent to hinder and delay creditors* and is *"a badge of fraud."* This is especially true when we consider the language of this court with reference to just such an instrument in the case of *Mayfield Woolen Mills Co.* v. *Goodrich & Martineau,* 189 Wis. 406. There the court stated:

> "It is drafted ingeniously and presents a comprehensive scheme for the administration of the trust property. It appears to us that it creates a practical and workable trust, and we assume that its use is often resorted to by adjustment Bureaus acting in the interests of creditors. The principal advantage to be derived from such an instrument is the proper retention of the business as a going concern, and the maintenance as an asset of its good will; and in addition thereto it affords an opportunity for payment of claims of creditors in full." (Page 412.)

Counsel may disagree with us, but we do feel that after all is said and done, there is such a thing as the march of progress, and that with changing economic and social conditions the outworn and outmoded machinery provided by an earlier law for the solution of business problems must give way. The approach to the problem presented by the Workmen's Compensation Act as illustrated in the case of *Borgnis* v. *Falk Co.*, 147 Wis. 327, exactly epitomizes the approach that should be made to the problem here. Not only do our conceptions of constitutional mandates as in the *Borgnis* case change with changing times, but so does our conception of the meaning of human actions and the inferences to be drawn therefrom. As Justice Winslow so well said in that case:

> "Where there is no express comment or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration and become influential features in the settlement of problems of construction and interpretation." (Page 349.)

The small merchants and manufacturers of the Nineteenth Century have been supplanted in this machine age with an infinitely more complicated business and financial system, with huge corporate structures and tremendously involved and inter-related systems of credit, requiring a new type of machinery to meet the problem of the failing business man. We submit that in this day and age the type of assignment involved in the *Mayfield Woolen Mills* case and involved in these cases is at least as well, if not better, fitted to protect the interests of creditors than the type of assignment which the court thought proper in the case of *Lord* v. *Hutchinson, supra,* and we submit that it can no longer be said that the good faith limitation of the liability of the assignee, an authorization to sell assets on credit, and an authorization to continue the gradual liquidation and winding up of business, is a badge of fraud.